

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI**

ENTERPRISE FINANCIAL GROUP,)	
INC.,)	
Plaintiff,)	
)	Case No 4:16CV1619 HEA
v.)	
)	
RICHARD PODHORN, et al.)	
)	
Defendants.)	

OPINION, MEMORANDUM AND ORDER

This matter is before the Court on Defendant CapDev, LLC's Verified Emergency Motion to Cancel Notice of Lis Pendens, [Doc. No. 28]. Plaintiff opposes the motion. On December 20, 2017, the Court held a telephone conference on the record. For the reasons set forth below, the Motion is granted.

Plaintiff filed this action seeking damages against twenty four defendants, including Moving Defendant CapDev, LLC. The Amended Complaint alleges a claim for Fraudulent Transfer Under RSMo §428.028. Within the body of this count, Plaintiff sets out the following allegation:

Under RSMO. § 428.029, Plaintiff EFG requests as a result of Defendants' fraudulent transfers:

A. avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;

B. an attachment or other provisional remedy against the asset transferred or other property of the transferee; or

C. subject to applicable principles of equity and in accordance with applicable rules of civil procedure:

- i. appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
- ii. any other relief the circumstances may require.

Plaintiff's First Amended Complaint, ¶ 133.

Plaintiff's Prayer for relief, however, seeks the following remedy:

WHEREFORE, Plaintiff prays that judgment be entered for Plaintiff against Defendants for actual and exemplary damages in an amount to be proven at trial, prejudgment and post-judgment interest, reasonable attorney's fees and costs, and any other relief the court deems appropriate.

In its verified Motion, Defendant avers that on June 27, 2017, Plaintiff filed a Notice of Lis Pendens with the Recorder of Deeds of St. Charles County, Missouri against property owned by CapDev. This property is part of a commercial development, for which Defendant has sought construction financing. The loan was set to close on December 19, 2017, however, it cannot close because of the Notice of Lis Pendens.

Under Missouri law, a Notice of Lis Pendens may be filed when there is a civil action "based on any equitable right, claim or lien, affecting or designed to affect real estate." Rev.Stat.Mo. § 527.260.

Plaintiff's Amended Complaint seeks recovery of "actual and exemplary damages," and *not* equitable relief, hence, as presently stated, the civil action is not "based on any equitable right, claim or lien, affecting or designed to affect real estate. See *S.B. McLaughlin & Company, LTD v. Tudor Oaks*, 877 F.3d 707, 708 (8th Cir. 1989); *El Petron Enterprises, LLC*, 2017 WL 782277, at *2.

Accordingly,

IT IS HEREBY ORDERED that Defendant CapDev, LLC's Verified Emergency Motion to Cancel Notice of Lis Pendens, [Doc. No. 28], is granted, without prejudice.

IT IS FURTHER ORDERED that Plaintiff shall cancel the Notice of Lis Pendens by the close of business on December 21, 2017.

Dated this 20th day of December, 2017.



HENRY EDWARD AUTREY
UNITED STATES DISTRICT JUDGE